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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 925

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

J. H. RUTTER-REX MANUFACTURING COMPANY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 957–973) is reported at 399 F. 2d 356. The supplemental decision and order of the National Labor Relations Board are reported at 158 NLRB 1414 (R. 3–18).

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1968 (R. 974–975). On October 1, 1968, the court of appeals denied the Board's timely petition for rehearing *en banc* (R. 976). On December 23, 1968, Mr. Justice Fortas extended the time for filing a petition for a writ of certiorari to and includ-

ing January 9, 1969, and the petition was filed on that date; it was granted on March 3, 1969 (R. 977). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in denying employees back pay to which they were otherwise entitled under the National Labor Relations Act because of the Board's alleged "inordinate delay" in processing the backpay claims.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*, and the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. (1964 ed.) 1001, *et seq.*, are set forth in the Appendix, *infra*, pp. 29–30.

STATEMENT

In April, 1954, after the respondent J. H. Rutter-Rex Manufacturing Co. ("the Company") failed to bargain in good faith with the certified representatives of its employees, the Amalgamated Clothing Workers of America, AFL–CIO,[1] the employees went on strike. Unfair labor practice charges were filed against the Company. In April, 1955, while these charges were pending, the Union terminated the strike and unconditionally applied for reinstatement on behalf of 159 strikers (R. 44–46; 649–652, 733–738, 740–742). Rather than make an immediate offer to reemploy these strikers—which would have avoided any possibility of backpay liability as to them—the Company responded

[1] The Union is a party here.

that strikers desiring to return to work should apply at its personnel office at a rate no greater than 20 per day (R. 44–45; 651, 739). As a result, some strikers were never reinstated, and others were reinstated more than five days after their unconditional applications to return (*infra,* p. 6).

The Board concluded its consideration of the unfair labor practice charges against the Company in February, 1956. It found that the Company's actions had violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), and had prolonged the strike. It accordingly directed, *inter alia*, that the Company:

> Upon application, offer immediate and full reinstatement to their former or substantially equivalent positions to all those employees who went out on strike on April 21, 1954, or thereafter, * * * dismissing if necessary all persons hired on or after that date, and make such applicants whole for any loss of pay suffered by reason of the [Company's] refusal, if any, to reinstate them * * * [,]

with an employee's eligibility for back pay to commence five days after his application for reinstatement. *J. H. Rutter-Rex Mfg. Co.,* 115 NLRB 388, 391, 417. The court of appeals enforced the Board's order, *National Labor Relations Board* v. *J. H. Rutter-Rex Mfg. Co.,* 245 F. 2d 594 (C.A. 5), and embodied the above provision in its decreee, entered on August 19, 1957 (R. 18, 43).

On August 21, 1957, the Board's regional office wrote to the Company. It offered assistance in "effect-

ing prompt compliance" with the decree and also stated:

> When you have fully complied with the affirmative terms of the decree and there are no violations of its negative provisions, you will be notified that the case has been closed. Until you receive such notice you will know that the case remains open for all purposes as awaiting compliance. [R. 904–905.][2]

On November 7, 1957, counsel for the Company wrote to the regional office that it had complied with "*some* of the provisions of the decree" [emphasis supplied]; he added:

> If any instance of a failure to fully comply with the order is brought to your attention, we would appreciate your contacting us promptly so that such corrective measures as may be necessary can be immediately taken in order to assure full compliance with the decree. [R. 55–56; 632–633.]

Since no unfair labor practice discharges were involved, neither the Board's order nor the court's decree enumerated the specific individuals encompassed by the reinstatement and backpay provisions. Thus, the regional office was faced with the task of locating and interviewing approximately 600 claimants to determine which of them were entitled to offers of

[2] The notice referred to is sent to a respondent whenever a case is closed following compliance with the Board's order. The Company had received such a closing letter from the regional office only a few months earlier, in April 1957 (R. 906–907), in connection with another case in which it was found to have violated the statutory right of its employees. 111 NLRB 1099, enforced, 229 F. 2d 816 (C.A. 5).

l back pay. One contact had been
reinstatemer ssary to determine which employees
made, it was d, the dates of reinstatement, and
had been re been reinstated to their former or
whether the valent jobs. Finally, the regional
substantially te the gross back pay due each eligi-
office had to determine the amount of his earn-
ble claimant nployment which could be credited
ings from of st the Company's backpay liability.
as a set-off (R. 903).

This task rther complicated by the extremely
heavy caseld severely limited staff which the
Board in gea and its New Orleans regional office
in particular rienced at this time and for several
years therea he New Orleans office had only six
attorneys wh court of appeals' decree was entered
in 1957, as o to its present fifteen. Between July
1, 1957 and ber 31, 1961, over 2,200 new cases
were filed in gional office, some involving the in-
vestigation a al of matters of complexity and im-
portance in minister of the Act. When the
decree was e , four other important and complex
compliance c volving over 665 backpay claimants
were already ng;[3] except for occasional help by an
attorney or f aminer, the regional office's one com-

[3] These cases *Lion Oil Co.* v. *National Labor Relations Board*, 245 F. C.A. 8); *National Labor Relations Board* v. *Brown & Ro* 203 F. 2d 139 (C.A. 8); *National Labor Relations Board* v. *Nabors Co.*, 196 F. 2d 272 (C.A. 5), certiorari denied, 1412, enforced U.S. 865; and *B.V.D Company*, 110 NLRB

 ant part, 237 F. 2d 545 (C.A. D.C.).

pliance officer had to work on these cases, as well as the present one and all others in the regions alone. Thus, he had to investigate the backpay and reinstatement rights of well over 1,200 persons and, either by litigation or settlement, secure compliance with Board orders and court decrees.[4] (R. 902–903.)

In October 1957, the regional office had received a list of strikers who had applied for reinstatement and certain payroll records from the Company (R. 625–631). During succeeding months, it also received from employees claiming back pay statements regarding their other employment during the period (R. 639–640, and see *e.g.*, R. 755–758, 763–770, 777–784, 793–796). On this basis, it had been able by March of 1960 to reduce the number of backpay claims from about 600 to 470. It then wrote the Company requesting various payroll, Social Security, and personnel records (R. 634–635). By October 1960, the regional office had sufficient manpower to assign an attorney to work with the compliance officer on the case full time (R. 638–639).

The result of the regional office's investigation was announced on November 16, 1961, in the form of a 428-page backpay specification made in the name of the Regional Director (R. 316–587). The Director found that 207 employees either had never been reinstated or had been reinstated more than five days after their unconditional application, and set forth on their

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[4] Although the New Orleans Office was commended for its case handling (R. 947–948), this was for its work in the year 1961, when with increased manpower it was able, *inter alia*, to finish the backpay specification in this case.

behalf backpay claims as of June 30, 1961, totalling $342,764.07 (R. 581–586).[5]

Before filing its answer to the specification, the Company sought an injunction in the court of appeals against further action in the backpay proceedings, alleging improper delay in issuing the specification. The court of appeals temporarily stayed the proceedings before the Board, but then declined to intervene and dissolved its stay. *National Labor Relations Board* v. *J. H. Rutter-Rex Mfg. Co.*, 305 F. 2d 242. The Company then filed its answer with the Board (R. 588, 601), and the matter proceeded to a lengthy hearing before a Trial Examiner.

In the subsequent proceedings, the Board rejected the Company's repeated objection that the delay in issuing the specification barred the claims. Specific challenges to the awards were entertained, however, and the scope of the backpay order was reduced accordingly. Thus, the Trial Examiner's decision, dated June 2, 1964, denied back pay to 35 of the 207 remaining claimants, and reduced the total amount to be paid to $160,894.69 (R. 315). On June 3, 1966, the Board adopted the Trial Examiner's findings,

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[5] As provided in the Board's Rules and Regulations (Sec. 102.53(a), 29 C.F.R. 102.53(a)), the specification showed in detail, for each employee, "the back-pay periods broken down by calendar quarters, and specific figures and basis of computation as to gross back pay and interim earnings, the expenses for each quarter, the net back pay due, and any other pertinent information." No back pay was calculated for the period after June 30, 1961; but for the court of appeals' decision, however, it would have continued to accrue as to any employee who had not been given a valid offer of reinstatement or had not been fully reinstated by that date (R. 72–73, n. 3).

conclusions and recommendations in substantial part, but modified the award as to 12 individuals; it ordered the Company to pay a total of $159,016.32 to 171 employees (R. 17).

The court of appeals further narrowed the order by refusing to enforce the award as to 10 of the employees, an action which the Board believes to have been erroneous but which did not, in its view, warrant further review here (R. 957–973). The court also, however, ruled that no back pay could be awarded to the remaining 161 employees for any day after June 30, 1959. This ruling cut short the period for 37 employees who had not received complying offers of reinstatement from the Company by that date, and thus would otherwise have been able to claim continuing accrual of back pay.

In support of its ruling, the court stated that the Board had done "nothing of any consequence" to obtain compliance with the reinstatement-backpay aspects of the decree between sending its letter in August 1957, and requesting records in March 1960 (R. 967); and that, although the Company itself had "moved at a snail's pace" in the reinstatement of its employees (R. 966) and could not shift or avoid its duty of compliance by asking the Board to notify it of any instances of noncompliance with the decree (R. 968), nevertheless the Board's inaction constituted "inordinate" delay which "lulled [the Company] into the belief that the Board was satisfied and that no further action was to be expected" (R. 970). The court acknowledged that the doctrine of laches cannot be invoked against the government

(R. 960, 966), but concluded that the Administrative Procedure Act gave the Company "a legal right to expect the Board to proceed with reasonable expedition" and that the "inordinate" four-year delay between the court's first decree and the backpay specification prejudiced the Company's ability to defend the backpay claims (R. 968). The court then chose the June 30, 1969, date as the most suitable accommodation of the competing interests "of the Board, of the Union, and of the employees" (R. 972).

ARGUMENT

INTRODUCTION AND SUMMARY

The basic reasoning of the court of appeals was that the Board had been unreasonably slow in handling the compliance aspects of this case, and that the Board's remedy had to be cut back in order to accommodate the harm thereby done to the Company. Although the court denied that it was applying the doctrine of laches against the Board, the reasoning is the same as would have accompanied an application of that doctrine. We therefore contend that a claim of undue delay (laches) cannot be invoked to defeat a public right, and that the Board's remedy of reinstatement and back pay is such a right. Since the court's action here defeats the Board's remedy in substantial measure, it was improper and should be reversed.

Second, we show that, even if it were thought proper in some cases to modify a Board decree because of the effects of delay, the present case would not be appropriate for such an action. In all the cir-

cumstances of the case, the delay involved was not unreasonable. Nor can it be shown that the Company's interests were prejudiced by the delay.

I. THE COURT OF APPEALS' REFUSAL TO ENFORCE PART OF THE BOARD'S REMEDY BECAUSE OF DELAY AMOUNTS TO THE APPLICATION OF LACHES AGAINST PUBLIC RIGHTS, AND IS ERRONEOUS

The equitable doctrine of laches bars a claim entirely if there has been inexcusable delay in seeking a remedy, and the defendant has thereby been prejudiced. *Gardner* v. *Panama R. Co.*, 342 U.S. 29, 31; *Czaplicki* v. *The Hoegh Silvercloud*, 351 U.S. 525, 533. The court below relied upon both of these elements, finding inexcusable delay on the part of the Board and prejudice to the Company in the processing of the backpay claims. The same reasoning would have led to application of the doctrine of laches, barring the entire backpay claim, were that doctrine applicable. Here, the court of appeals stated that it was not applying laches as such, and denied only partially the remedy the Board sought to enforce. Thus, the only difference between the court's reasoning and action, on the one hand, and an application of the doctrine of laches, on the other, was the extent to which relief was foreclosed.

A. THE COURT OF APPEALS CORRECTLY RECOGNIZED THAT IT COULD NOT MAKE A STRAIGHTFORWARD APPLICATION OF LACHES

1. The defense of laches may not be invoked against claims of public right

It is settled doctrine that a suit brought by the United States or any of its agencies to enforce a

public right may not be defeated on grounds of laches. *United States* v. *Summerlin,* 310 U.S. 414, 416; *Chesapeake & Delaware Canal Co.* v. *United States,* 250 U.S. 123, 125; *United States* v. *Knight,* 14 Pet. 301, 315; *United States* v. *Kirkpatrick,* 9 Wheat. 720, 735. The basic reason for the rule "is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers." *Guaranty Trust Co.* v. *United States,* 304 U.S. 126, 132, quoting from Story, J., in *United States* v. *Hoar,* Fed. Cas. No. 15,373, p. 330. Cases "where the Government, although a nominal complainant party, has no real interest in the litigation, but has allowed its name to be used therein for the sole benefit of a private person," *United States* v. *Beebe,* 127 U.S. 338, 344, are indeed subject to the ordinary operation of laches; but where a public interest appears, it is clear that laches may not be applied to its prejudice.

By its reliance on Section 6(a) of the Administrative Procedure Act, 5 U.S.C. (1964 ed.) 1005(a) for the proposition that the Company had a right not to be subjected by the Board to undue delay in the processing of compliance issues, the court of appeals may have been saying that by that Act Congress had abrogated the rule that laches is not available as a defense against a claim of public right. But "[t]here is no indication that Congress intended to overrule this long-settled doctrine by the enactment of the Administrative Procedure Act." *Nabors* v. *National Labor Relations Board,* 323 F. 2d 686, 689 (C.A. 5), certiorari denied, 376 U.S. 911. Although Section 6(a)

requires "[e]very agency [to] proceed with reasonable dispatch to conclude any matter presented to it,"[6] the limited remedy for a failure so to act is stated in Section 10(e)(A), 5 U.S.C. (1964 ed.) 1009(e)(A): courts may "*compel* agency action unlawfully withheld or unreasonably delayed" [emphasis added].[7] At least one proposal before Congress when those sections were enacted apparently would have relieved private parties from the consequences of undue agency delay;[8] but no such language appears in the Act. Rather, what legislative history of Section 6(a) there is suggests that it was thought to embody no new principle.[9] Thus, it was characterized as "a statement of legal requirement that no agency shall in effect deny relief or fail to conclude a case by mere *inaction*" [emphasis added].[10] Correspondingly, Section 10(e)(A) was said to recognize "the right of properly interested parties to compel agencies to act where they improvidently refuse to act."[11] This power is relevant only to the command of Section 6(a) that agencies proceed with "reasonable dispatch"; it was stressed that it was not intended to permit the courts to substitute their judgment for agency discretion—as

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[6] The section now provides (80 Stat. 385, 5 U.S.C. (Supp. IV) 555(b)):

> With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.

[7] This provision was unchanged by the 1966 amendments. 80 Stat. 393, 5 U.S.C. (Supp. III) 706(1).

[8] *Legislative History of the Administrative Procedure Act*, S. Doc. 248, 79th Cong., 2d Sess. 333.

[9] *Id.* at 25–26, 204–205, 264, 316, 363.

[10] *Id.* at 205.

[11] *Id.* at 214, 278.

would a complete or partial refusal to enforce the remedy an agency had determined would be in the public interest.[12] Thus, there is reason to believe Congress did not mean to go further and subject agency action already taken to invalidation on the ground of delay.

Deering Milliken, Inc. v. *Johnston,* 295 F. 2d 856 (C.A .4), on which the court below relied (R. 968–969), is consistent with this analysis. There, injunctive relief to compel agency action was sought under Section 10 (e)(A); the court, finding that the Board had unduly delayed a final decision by ordering excessive remands to the Trial Examiner for further hearings, placed restrictions on what further hearings could be held. In so doing, it did not foreclose the Board from proceeding, but ordered it to do so without further unjustified delay. See also *Atlantic & Gulf Steve-*

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[12] *Ibid.;* see also *id.* at 39–40, 230, 323, 370, 377 and *Attorney General's Manual on the Administrative Procedure Act* (U.S. Dept. of Justice, 1947) 65: "The fourth sentence of section 6(a) * * * merely restates a principle of good administration." *Id.*, at 108: "Clause (A) [of Section 10(e)] * * * appears to be a particularized restatement of existing judicial practice" with respect to obtaining relief in the nature of mandamus "to compel an administrative agency to act, *Safeway Stores, Inc.* v. *Brown* * * * [138 F. 2d 278 (E.C.A. 1943), certiorari denied, 320 U.S. 797], or to assume jurisdiction, *Interstate Commerce Commission* v. *United States ex rel. Humboldt Steamship Co.*, 224 U.S. 474 (1912) * * *."

The relationship between Section 6(a) and Section 10(e)(A) is if anything clearer under the recent codification of Title 5. Compare 5 U.S.C. 555(b) ("* * * within a reasonable time, each agency shall proceed to conclude a matter presented to it") with 5 U.S.C. 706(1) ("compel agency action * * * unreasonably delayed").

dores, Inc. v. *Donovan,* 274 F. 2d 794, 802 (C.A. 5); *Safeway Stores, Inc.* v. *Brown,* n. 12, *supra.* The judicial help sought in the present case, on the other hand, was not to speed the compliance proceedings, but to nullify action the agency had already taken. Unlike the relief ordered in *Deering Milliken,* such relief is outside the authority conferred either by judicial tradition, n. 12, *supra,* or the Administrative Procedure Act.

2. The Board's remedy of back pay and reinstatement vindicates a public right

Section 10(c) of the National Labor Relations Act empowers the Board, upon finding an unfair labor practice, to enter an order requiring the respondent, *inter alia,* "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." This Court repeatedly has recognized that the remedy of back pay and reinstatement protects a public, not a private, right. It is "designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice." *Nathanson* v. *National Labor Relations Board,* 344 U.S. 25, 27; *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U.S. 177, 197; *National Licorice Co.* v. *National Labor Relations Board,* 309 U.S. 350, 362–363; *Amalgamated Utility Workers* v. *Consolidated Edison Co.,* 309 U.S. 261–265. "Only thus can there be a restoration of the situation, as nearly as possible, to that which would have obtained but

for the illegal discrimination." *Phelps Dodge, supra,* 313 U.S. at 194.

In recognition of the public nature of the remedy, this Court and the courts of appeals consistently have refused to bar it on account of the lapse of time. Thus, in *National Labor Relations Board* v. *Electric Vacuum Cleaner Corp.,* 315 U.S. 685, this Court declined to shorten the period of backpay compensation despite the Board's two-year delay in determining whether there had been any unfair labor practice. While it agreed that the processing of complaints "as quickly as is consistent with good administration is of course essential," it concluded that it could not "penalize the employees" for the delay. 315 U.S. at 698. In *National Labor Relations Board* v. *Mastro Plastics Corp.,* 354 F. 2d 170, 180–181 (C.A. 2), certiorari denied, 384 U.S. 972 (four years between court enforcement decree and Board backpay specification), and *Nabors* v. *National Labor Relations Board,* 323 F. 2d 686, 688–689 (C.A. 5), certiorari denied, 376 U.S. 911 (six and one-half years between court enforcement decree and Board backpay specification), the employer's contention that its backpay liability should be reduced because of the Board's delay was flatly rejected. As the court stated in *Nabors,* 323 F. 2d at 689: "We agree with the Board that the claims set forth in the back pay specifications are not barred by limitations or laches, and further that the evidence offered by the [employer] to show irreparable injury caused by the delay was irrele-

vant." [13] "Inordinate delay in any case is regrettable, but Congress has introduced no time limitation into the Act except that in § 10(b)." [14] *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 748, n. 16.

In sum, proceedings to enforce Board orders for back pay and reinstatement are not "for the sole benefit of a private person," *United States* v. *Beebe*, *supra*, but for the vindication of a public interest. The Fifth Circuit correctly held in *Nabors*, *supra*, that the doctrine of laches could not be applied completely to foreclose enforcement of that right.

B. THE COURT OF APPEALS' REFUSAL TO ENFORCE THE BOARD'S REMEDY ONLY IN PART DOES NOT JUSTIFY ITS LACHES APPROACH

The court of appeals refused to enforce the Board's remedy only in part—that part relating to the period after the arbitrarily chosen date of June 30, 1959. In so doing it appears to have been influenced by its view that "the purpose of a backpay award is *to deter unfair labor practices* * * *" (R. 971, emphasis sup-

[13] See also *National Labor Relations Board* v. *William Davies Co.*, 135 F. 2d 179, 183–184 (C.A. 7), certiorari denied, 320 U.S. 770; *National Labor Relations Board* v. *Wilson Line, Inc.*, 122 F. 2d 809, 815–816 (C.A. 3); *National Labor Relations Board* v. *American Creosoting Co.*, 139 F. 2d 193, 196 (C.A. 6), certiorari denied, 321 U.S. 797; *Pacemaker Corp.* v. *National Labor Relations Board*, 260 F. 2d 880, 883 (C.A. 7); *National Labor Relations Board* v. *Injection Molding Co.*, 211 F. 2d 59, 66 (C.A. 8); *Triplex Screw Co.* v. *National Labor Relations Board*, 117 F. 2d 858, 862 (C.A. 6).

[14] Section 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made * * *."

plied) and its assumption that that purpose would be met by its action. Were the purpose so limited, and could deterrence be achieved by only partial enforcement of the Board's award, perhaps the outcome of this case could be justified. But the purpose of a backpay award is not that narrow; the public purposes of the award cannot be satisfied without full enforcement of the Board's award; and it would be inappropriate to penalize the employees for any of the delay complained of in this case.

The notion that the purpose of a backpay award is to "deter" unfair labor practices is at best incomplete. Deterrence is sometimes associated with punishment; but the aim of back pay is not to punish the employer for what he has done, but to restore the situation as nearly as may be to what it was before his act—to remedy any harm done to his employees, to deprive him of any advantage he may have gained, and thereby to restore balance in the labor relationship. The particular remedy of back pay has a further, institutional aspect. Employers may be recalcitrant in complying with Board remedial orders; by delaying or preventing reinstatement, an employer may be able to aggravate or assure the weakening of a union movement which was the target of his unfair labor practices in the first place. To that extent, it may be to the employer's interest to wait for the Board to take the first step in securing compliance with reinstatement orders. The steady cumulation of backpay liability acts as a counter-pressure to this attitude; since at any moment the employer can limit

his liability by making a complying offer of reinstatement, the backpay order serves in this respect to promote self-compliance with reinstatement orders. Cf. *National Labor Relations Board* v. *Seven-Up Bottling Co. of Miami,* 344 U.S. 344, 347–348.

These purposes were not satisfied, and indeed will be frustrated, by the court of appeals' action in limiting enforcement of the Board's award. Those employees who had valid claims to reinstatement but had not yet received complying offers as of June 30, 1959 are made to suffer, without full remedy, harm resulting directly from the employer's unfair labor practices; and to that extent the employer is permitted to retain an illegally acquired imbalance in the labor relationship. Indeed, it has been pointed out that after such long delay even a full backpay remedy "could not undo the economic hardship caused by many years of undeservedly substandard earnings." *Mastro Plastics Corp., supra,* 354 F. 2d at 180-181. Even assuming that the Board is "at fault" for the delay, the Company's obligation to reinstate was continuous and clear; the Company could have limited its backpay obligations at any point by making the requisite offers of reinstatement.[15] The employees, on the other hand, had no control over either the Com-

[15] It is true that the Board's order did not specifically name the employees to be reinstated—a matter which the Company stressed in its Brief in Opposition, p. 5. But this will almost always be the case where, as here, an unfair labor practice strike, rather than unfair labor practice discharges, is involved. As the court of appeals stated, the Company's reinstatement obligation "just could not have been misunderstood" (R. 964). The order here defined the class of employees covered with sufficient specificity to enable the Company to determine to which individuals its obligation ran.

pany's ac
ought not
error. *Nor* the Board's,[16] and hence certainly
Vacuum (the ones to bear the brunt of any
ly, curbin*Labor Relations Board* v. *Electric*
in this c*Corp., supra,* 315 U.S. at 698. Final-
complianc cumulation of back pay, as was done
to increa its the incentive to employer self-
matters. reinstatement orders and is likely
ing comp level of litigation over compliance
interrupt sult may be greater delay in secur-
ordained generally, and interference with and
The co the remedial scheme Congress
reasoning
simply a tion is inappropriate even if its laches
It is of c ored, and the question is considered

[16] They review of Board remedies generally.
ihan v. *Nat* lear that the *Board* could have taken
certiorari
compel co compel the issuance of a complaint, *Hour-*
Workers, *or Relations Board*, 201 F. 2d 187 (C.A.D.C.),
Counsel a 345 U.S. 930, and have standing neither to
Relations with a Board order, *Amalgamated Utility*

[17] The f r to veto a settlement between the General
ployees w nployer, *Textile Workers* v. *National Labor*
instatemen 94 F. 2d 738 (C.A.D.C.).
the last d his case underscore this point. Here, 35 em-
But for t Board and court agreed were entitled to re-
accrue fo t received offers thereof as of June 30, 1961,
couraging ch the Board's backpay specification applied.
Under th its order, back pay would have continued to
the possi nployees until an offer was made—thus en-
ment obli pany to honor its reinstatement obligation.
Examinen order, the Company now is subject only to
of reinsta ontempt proceedings to enforce its reinstate-
1964 (R. d can await the Board's initiative. The Trial
Others m at 13 employees still had not received any offer
pany s ob of the conclusion of the hearings before him in
87, 102, 105, 112, 185, 189, 215, 216, 222, 232).
ceived offers that did not fully meet the Com-
see R. 72–73, n. 3).

account of the delay in the compliance proceedings if that had seemed to it to be a significant element of the public interest. *Phelps-Dodge Corp., supra,* 313 U.S. at 198. During the course of the Company's efforts to secure injunctive relief before the processing of the backpay specification, the Board stated that it would consider whether that factor should be taken into account,[18] and the issue was fully litigated before it (R. 52–58). The Board decided, however, against taking the delay into account.

Such remedial matters are peculiarly within the Board's discretion. This Court has continually emphasized the breadth of the Board's authority to mold a remedy to fit a particular violation and undo its ill effects.[19] What the Board ordains will not be set aside "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Fibreboard Corp.* v. *National Labor Relations Board,* 379 U.S. 203, 216, quoting from *Virginia Electric Co.* v. *National Labor Relations Board,* 319 U.S. 533, 540. In view of the inadequacies even of

[18] Brief for the National Labor Relations Board, *J. H. Rutter-Rex Mfg. Co.* v. *National Labor Relations Board*, No. 16422 (Motion to Enjoin the backpay proceedings) in the United States Court of Appeals for the Fifth Circuit, p. 15 (1962).

[19] See, *e.g., Fibreboard Corp.* v. *National Labor Relations Board*, 379 U.S. 203, 216; *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241, 250; *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350, 361–366; *Virginia Electric Co.* v. *National Labor Relations Board*, 319 U.S. 533, 538–544; *Int'l Ladies' Garment Workers' Union* v. *National Labor Relations Board*, 366 U.S. 731, 735, 736, 739–740; *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702.

full back pay as a remedy for the loss suffered by the employees after such delay, and the Company's reluctant attitude toward its reinstatement obligation (R. 49–63), it cannot be said that the Board's determination was improper in this sense.

II. THE BOARD DID NOT UNREASONABLY DELAY THE COMPLIANCE PROCEEDINGS, AND REASONABLY FOUND THAT THE COMPANY HAD NOT BEEN PREJUDICED BY THE DELAY

A. THE BOARD DID NOT UNREASONABLY DELAY THE COMPLIANCE PROCEEDINGS

The court of appeals found that the four years which elapsed between its enforcement decree and the Board's issuance of the backpay specification constituted "inordinate delay" on the Board's part. The Board cannot dispute that this lapse of time was regrettable—although considerably shorter than that which occurred in *Nabors, supra,* and comparable to that in *Mastro Plastics, supra.* It does dispute the finding that the delay was "inordinate," or unreasonable or culpable, a finding necessarily central to the court's laches approach.[20]

> There are no absolute standards by which it may be determined whether a proceeding is being advanced with reasonable dispatch. What

[20] In an earlier opinion, where another panel of the court below declined to enjoin the Board backpay proceeding (see *supra*, p. 7), there is the statement: "In effect, counsel for the Board has admitted the obvious assertion of the employer that there has been inordinate delay in this case" (305 F. 2d at 244). Since the Board had opposed the Company's request for an injunction on jurisdictional grounds, its "admission," if any, was merely for the purpose of obtaining a determination of the jurisdictional issue.

> is reasonable can be decided only in the light of the nature of the proceedings and the general and specific problems of the agency in discharging its functions and its duties. Everyone cannot be given prompt and immediate hearings by an administrative tribunal which has a caseload beyond its capacity to process promptly. Statements of officials of the Board before the Subcommittee of the House Labor Committee on May 8, 1961, Part 2 of CCH Labor Law Reports No. 45, May 18, 1961, disclose the great increase in the caseload and the consequent difficulties which confront the Board in keeping abreast of its work. * * *

Deering Milliken, Inc. v. *Johnston,* 295 F. 2d 856, 867–868 (C.A. 4); see also *Mastro Plastics, supra,* 354 F. 2d at 181. Here, as in *Nabors* and *Mastro Plastics,* the delay was excusable in all the circumstances of the case.

As the court below recognized in its first decision in this case, the task of ascertaining "the myriad of details respecting the right to, and extent of, the remedy as to each specific striker out of [the Company's] large labor force" was formidable.[21] *National*

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[21] The failure of the Company to comply with the affirmative portions of the Board's order requiring immediate reinstatement, in itself, increased this complexity and thus contributed to the delay in issuing the backpay specification. Had the Company made an immediate offer of reinstatement to all strikers upon entry of the court of appeals' decree, it would both have fixed its backpay liability as of that date and lessened the task of locating and interviewing claimants and determining the amounts of back pay due.

Labor Relations Board v. *J. H. Rutter-Rex Mfg. Co.*, 245 F. 2d 594, 598 (C.A. 5). It was necessary to locate and to make contact with about 600 employees, and to make an extensive study of the Company's personnel and payroll records to determine the threshold question of which employees were entitled to reinstatement. How much back pay was due those employees who had not been promptly or properly reinstated could be resolved only after conducting personal interviews with the employees, taking sworn statements as to their interim employment and search therefor, checking Social Security records, and contacting other employers. (*Supra,* pp. 4–5). The actual preparation of the 428-page backpay specification, once that information was assembled, was itself a protracted chore. To determine gross back pay, it was necessary to find the average gross pay of a control group of 183 Company employees (selected only after a thorough study of the Company's payroll records) for each pay period during the more than six years of the backpay period, and then to allocate these sums to each claimant; to determine net back pay, it was necessary to deduct the claimant's net earnings from other employment from the gross backpay figures, and also to eliminate from the claim all periods when the claimant was out of the labor market because of sickness, pregnancy, or other reasons (R. 25–38).

This task was further complicated by the institutional factors set out in the Statement, *supra,* pp. 5–6: severe understaffing of the Board generally, and its New Orleans regional office in particular; the prior

pendency of other important compliance matters, involving over 665 claimants; and a particularly heavy incoming caseload of unfair labor practice charges and proceedings which prevented the office's attorneys from affording assistance to the compliance officer. Even so, the office was able to eliminate about 130 backpay claims for lack of merit during the period between entry of the enforcement decree and the March 1960 request for further information which marked the resumption of full scale compliance efforts (R. 634–635). "Under these circumstances, *Rutter-Rex* could not have been processed more quickly without prejudice to cases which had been pending for considerably longer periods of time." Affidavit of John F. LeBus, Regional Director of the 15th (New Orleans) Region (R. 902). Considering the complexity of the problem and the paucity of Board resources at the time, it cannot be said that the Board was guilty of negligent or culpable delay in this case.

B. THE COMPANY WAS NOT PREJUDICED BY THE DELAY

The court below also concluded that the Board's failure to respond to the Company's letter of November 7, 1957 (*supra,* p. 4) for over two years lulled the Company "into the belief that the Board was satisfied and that no further action was to be expected" (R. 970). However, the Board's letter of August 21, 1957 (*supra,* p. 4) plainly stated that the Company would receive formal notification when the Board considered the case closed, and that "Until you receive such notice you will know that the case still re-

mains open for all purposes awaiting compliance." The Company was aware of Board procedure in such cases, having just received a formal closing notice after full compliance with the reimbursement provisions of an earlier Board order (*supra*, p. 4, n. 2). Moreover, the court below noted, the Company was "experienced in labor disputes and represented by outstanding counsel," and the command "that the employees should be reinstated upon application and made whole for any loss of pay they might have suffered by a refusal to reinstate * * * was the very heart of the litigation and the decree which followed" (R. 963–964).

Since it had not yet offered reinstatement to some of the strikers or paid any back wages, the Company could not reasonably have believed that the Board's failure to respond to its letter of November 7, 1957 meant that the Board was satisfied that the Company was in full compliance with its order. In any event, as the court below recognized in another portion of its opinion, "the Company could not shift or avoid its duty of compliance by asking the Board to notify it of any failures of compliance which might be brought to its attention" (R. 968).

Nor is there substance to the court's assertion (R. 971) that the Board's delay prejudiced the Company in establishing its affirmative defenses at the backpay hearing. First, the existence of unfair labor practices was promptly determined. Thus, in contrast to cases where delay occurred in determining whether or not there had been any such practices, *e.g., Electric Vacuum Cleaner Corp., supra*, p. 15, the Company was

aware of its reinstatement and backpay obligation throughout the period of the alleged delay. Accordingly, it must also have been aware of the necessity to preserve records and remain in contact with claimants in the event that the terms of its obligations could not be agreed upon with Board representatives. Cf. *National Labor Relations Board* v. *Deena Artware, Inc.*, 361 U.S. 398, 412–414 (concurring opinion).

Second, although the Company's ability to carry its burden to show matters reducing its backpay liability may have depended in large part on cross-examination of the claimants (R. 971), this factor is inherent in the type of information sought to be adduced, and not brought about by delay.[22] As the Trial Examiner pointed out (R. 52–53):

> In the nature of things, evidence concerning an employee's search for work is something peculiarly within the knowledge of the employee. It would be a rare case, indeed, where an employer would have an independent means of ascertaining the facts concerning an employee's search for work years before. And to develop the facts the employer has to rely on the employee whose interests are wholly adverse to those of the employer * * *.[1]
>
> [1] Even in cases which are handled most expeditiously (assuming that the case is litigated in the courts), several years elapse between the events in controversy and the holding of a back pay hearing.

[22] At the hearing, Board counsel turned over to the Company all affidavits obtained from the claimants, statements relating to their search for work and interim earnings, their correspondence with the Board, and their W-2 forms (R. 56–57; Tr. 1357–1361, 2500–2502, 2672–2673, 3239, 4018, 4171, 4957).

Moreover, as already indicated, the Company could have fixed its backpay liability and substantially reduced its litigation burden by making a prompt offer to reinstate the strikers. Instead, the Examiner found (R. 53):

> In over half of the cases here involved the Company defended its delay or refusal to reinstate on the grounds that it had no vacancy for the particular striker in her former operation. [But,] excepting in a very few cases, the Company did not even attempt to offer proof supporting this defense. In many of these cases, such proof as was adduced refuted the very contention being made. In other words, it established that a replacement was still working on the operation which the striker had done before the strike at the time of the striker's application for reinstatement. Thus the problems of proof concerning which the Company complains in this case were largely of its own making * * *. [T]he Company simply refused to dismiss replacements to make room for the returning strikers.

Finally, the decisions of the Trial Examiner and the Board show that the long delay in this case did not prevent the Company from eliciting sufficient facts to warrant a substantial reduction in its backpay liability. And, to the extent that the delay imposed a burden, that burden fell on claimants as well as on the Company.[23]

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[23] Some claimants had their claims dismissed or reduced because of their failure to remember events that occurred years before. See, *e.g.*, claims of Maybelle Johnson (R. 240–241), Anna Parker (R. 254–256), Gloria Dixon (R. 156–157),

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it limits the employee backpay awards contained in the Board's order to the period ending June 30, 1959, and the case should be remanded to that court with directions to enforce the Board's order without that limitation.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
PETER L. STRAUSS,
Assistant to the Solicitor General.
ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
ALLISON W. BROWN, JR.,
Attorney,
National Labor Relations Board.

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Mabel Watson (R. 202), Marie Rockett (R. 266–267), Hazel Burns (R. 244–245), Estelle Cornish (Davis) (R. 102–105), Dorothy P. Rubit (R. 11), and Shirley Crawford (R. 151). The claims of some potential claimants were not presented at all because they could not be located or had died (Tr. 217).

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*, are as follows:

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * *

The relevant provisions of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. (1964 ed.) 1001, *et seq.*, are as follows:

ANCILLARY MATTERS

SEC. 6. Except as otherwise provided in this Act—

(a) APPEARANCE.—* * * Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. * * *

* * * * *

JUDICIAL REVIEW

SEC. 10. * * *

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; * * *.

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